UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SPIKE ENTERPRISE, INC.,

Respondent/Employer,

Cases **14-CA-281652**
13-CA-282513
13-RC-281169

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

Charging Party/Petitioner.

RESPONDENT SPIKE ENTERPRISE, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO ALJ IRA SANDRON'S DECISION

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I. INTRODUCTION

Pursuant to Section 102.46 of the National Labor Relations Board's ("NLRB" or the "Board") Rules and Regulations, Respondent Spike Enterprise Inc. ("Spike" or "Respondent" or "Company") submits this Brief in Support of its Exceptions to the May 16, 2022 Decision and Order ("Decision") of Administrative Law Judge ("ALJ") Ira Sandron. Respondent excepts to the ALJ's findings that it violated Sections 8(a)(1) and (3) of the National Labor Relations Act ("NLRA" or "Act") and committed objectionable conduct.

II. PROCEDURAL HISTORY

The Union filed a petition on August 11, 2021. The Union two of Unfair Labor Practice ("ULP") charges on August 19, 2021 and September 7, 2021. Those ULPs were each amended. An election was conducted on November 23, 2021. Spike prevailed. The Union also timely filed Objections to the Election on December 1, 2021. On November 12, 2021, the Region issued a Complaint and Notice of Hearing against Respondent in Cases 14-CA-281652. On December 1, the Union filed Objections to the Conduct of the Election. On December 16, the Region issued an Amended Consolidated Complaint. The Complaint, as amended, alleged that Spike violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("Act") by interfering with, restraining, and coercing employees in the exercise of their Section 7 rights. The 8(a)(3) allegations in the Complaint pertain to the discharge two employees (Robert Rossey and Cody Franzen).The hearing in this matter was conducted via videoconference over the course of ten days before Administrative Law Judge Ira Sandron. Thereafter, the parties submitted post-hearing briefs.

III. BACKGROUND FACTS

Spike Enterprise employees perform the dangerous work of cleaning up spills and removing toxic refinery byproducts from process areas of oil refineries. (V. 750:15; VII. 1131:19-

22). Employees working in process areas of the refinery face the constant risks of flash fires and dangerous fumes, such as hydrogen sulfide ("H2S"), which can kill an employee with one errant breath. (II. 319:21; III. 450:23-23; VII. 1217:21-23).

Working as they do within hazardous process areas of properties owned and operated by oil companies such as Citgo and ExxonMobil, Spike employees must adhere to host companies' exacting standards for safety training and safety processes. (VII. 1105:11 – 1106:2, 1108:14-22; R. Ex. 39). This includes weeks of study and test-taking before a Spike employee even sets foot inside a refinery. (VII. 1063:3-12). This safety training continues on-site at the refinery. At ExxonMobil's site, safety training is also followed with an important "New Employee on Site Test," which ExxonMobil requires all employees to pass by their thirtieth day working at the refinery. (VII. 1065:1-19). Failure to pass this test within two attempts means that ExxonMobil deactivates the employees site access badge and the employee cannot retake the test for six months – effectively barring the employee from the site for at least six months. (VII. 1174:15-17).

A fundamental and constant aspect of risk mitigation requires all employees in refinery process areas to always wear fire resistant clothing (FRC) to protect against the ever-present danger and effects of flash fires in the process areas of the refinery. (I. 90:7-8, 24; II.341:9-15; VII. 1105:11 – 1106:2, 1108:14-22; R. Ex. 39). Because hydrogen sulfide exposure is life-threatening, all employees wear a hydrogen sulfide detection alarm to alert them to the presence of hydrogen sulfide gas. (I.91:2-4). One breath of H2S can be deadly so employees are trained on how to respond to an alert or "hit" on their H2S meters. (II.340:24-25 IV.630:4-8; VII 1117:23 – 1118:9; R.Ex. 12).

To Spike's knowledge, no employee ever suffered a H2S meter "hit" and failed to report it.

That is until August 12, 2021.[1] The evening before, Local 150 emailed to Dave Allen, Spike's Site Supervisor, the RC Petition along with a hyperlink to the NLRB website. (VII. 1238:6-9) Allen forwarded the email to Lee-Ann Hill, Spike's Vice President in Oklahoma, and on August 12, Hill shared with the Allen a copy of the RC Petition with the signed authorization cards.

On August 12, for the first time, alleged discriminatee Robert Rossey arrived at work wearing a Local 150 short sleeve t-shirt. Had he kept his Fire Resistant Clothing on over his t-shirt – or any other short sleeve shirt – he would have been in compliance with the ExxonMobil site safety rules. Yet Rossey intentionally removed his fire resistant clothing (FRC), failed to report his H2S meter "hit," failed to wear his H2S meter, and ran over the safety chocks with his vacuum truck. (R. Ex.37; VII. 1106:20, 21;1137:6, 1215:15-18). These unprecedented acts, in which Rossey committed simultaneous multiple safety violations could not be ignored, especially in light Rossey's prior safety violations over the previous months. (VII. 1148:19-20). The result was that Allen and Spike's President, Jeff Hill – after checking with legal counsel – made the decision that Rossey's unprecedented and multiple set of deliberate safety violations meant that Rossey was not safe to work at the refinery, and Spike terminated his employment. (III. 444:17-24; VII. 1164:15, 18-19; 1165:15, 1166:11255:7-11).

Only days later, another unprecedented event occurred when Spike employee Cody Franzen failed to pass his New Employee on Site Test. (R Ex. 88; II. 213:20-21; VII. 1092:16-17) In an effort to qualify Franzen to continue working at ExxonMobil, Dave Allen gave Franzen the answers to the questions he got wrong on the first test (II. 206:19-20, 211:16-18, 245:25-26), yet Franzen again entered the same wrong answers on his test and failed the test a second time. (R. Ex. 88; II. 213:20-21; VII. 1092:16-17). Allen had no alternative but to report the failed test to

[1] Unless otherwise noted, all dates occur in 2021.

ExxonMobil, who then turned off Franzen's refinery access badge pursuant to its policy. (VII. 1199:25-1200:2).

On August 16, Dave Allen presented a PowerPoint to the Spike Employees at ExxonMobil. (VII.1171:21-22, 1173:6). On August 17, according Allen and administrative assistant, Shelbi Bitner, Allen gave the same PowerPoint to Steve Selby. (V. 880:21-23; 878:18-20). During the Hearing before the ALJ, the General Counsel's Representative stated for the Record that the PowerPoint contained only legal statements regarding unionization and did not violate the Act. (VII. 1245:2-9). Despite this, Selby testified that Allen said, (1) "I had to make this PowerPoint because you guys signed these cards"; (2) that he fired Rossey "because he was a prick"; (3) that "he would never agree to the union for a contract"; (4) that "if we would go on strike for any unfair labor practices that he can't get rid of us, but if we went on strike for anything else we would be terminated"; and (5) that he had to go by the book and he had to be more strict. (IV. 643:1-2, 644:12-13, 644:17-25, 645:1-8).

Only two days later, seven employees went on strike. (II. 390:1-17, GC Ex. 2) They remain on strike to this day and were joined by an eighth employee in April 2022. No strikers have been fired. (VI. 1207:23-25 – 1208:1-2)

On two additional days in August, management consultant, Amed Santana shared with Spike employees his own PowerPoint presentation and a copy of Local 150's Constitution. (I. 300:19-21, 301:13 – 16, GC Ex. 8)) This second PowerPoint was itself found to be in compliance with the Act. (Gc. Ex. 8). However, David Schell, the GC's witness, recalled that Santana told them he was working on a decertification petition. (II. 304:24-25, 305:1-2).

None of the witnesses testified that Santana – or any other supervisor or member of management – asked them to sign a decertification petition. In fact, witnesses all testified that

fellow employee Jeff Lundberg asked them to sign the decertification petition. (IV. 545:25, 543:1-2; IV.549:13-14, 55:20,24; V. 700: 5-6; V. 733:9-11; V. 802:12 – 13; VI. 909:4-5)

The Union attempted to exclude six of the twenty-three eligible employees from the voting list. After a three day hearing, the Region issued a Decision and Direction of election in which the five employee were found to not be Section 2(11) supervisors and the sixth employee was found to not be a temporary employee. (GC. Ex. 10).

Ballots for the NLRB election were mailed out on October 25 and were tallied on November 23. (GC. Ex. 9). Despite a lack of any relevant evidence as to changed circumstances, Local 150 challenged the ballots of the same six employees previously found to be eligible voters in the DDE; however, citing a lack of any relevant new evidence as to these objections, the ALJ overruled the challenges to these ballots. (ALJ 4:16 – 24).

Eight ballots were "No" votes, and Local 150 received only five votes. Two of the strikers testified that they placed their ballots in the US Mail, but the ballots were never received by the NLRB. (Id. at 4:35 – 40). Notably, the Union's witnesses testified that at the height of organizing efforts just prior to August 12 there were at most, seven to nine employees who attended Local 150's organizing meetings. ((I. 49:15-24; see III. 424:4 (Rossey testified the number of employees peaked at seven)). Compare with (IV. 591:9 – 592:12) (Sundine testified that the early meetings had "two to three" attendees and the later meetings had "between eight and nine")).

IV. ARGUMENT

As discussed herein, the ALJ's findings are erroneous and should be reversed.

A. THE ALJ ERRONEOUSLY CONCLUDED THAT DAVID ALLEN WAS NOT CREDIBLE IS BASED ON A MISAPPREHENSION OF RECORD EVIDENCE AND TESTIMONY. [Complaint ¶ V(a) and Exception 15]

The ALJ's wholesale discrediting of statutory supervisor, Allen's testimony was in error and

contrary to longstanding Board law, as it was neither based on his observations of Allen's testimonial demeanor nor based on established facts, inherent probabilities, and reasonably inferences drawn from the record as a whole. *See Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990). Instead, the ALJ relied on misapprehensions of fact that unfairly and improperly prejudiced all findings and conclusions against Spike. Because the foundation underlying the ALJ's Recommended Decision—namely Allen's lack of credibility—is fatally flawed and irretrievably tainted the determinations therein, the conclusion that Spike violated Sections 8(a)(1) and (3) is likewise erroneous and must be reversed.

1. Allen's testimony about the genesis of his PowerPoint was indistinguishable from contemporaneously-made documentary evidence upon which the ALJ relied and must be credited. [Complaint ¶¶V(a), VI(a), and VI(c), and Exceptions 1, 2, 3, 5, 16, 20, 21, 22, and 23]

The ALJ erroneously found Allen's testimony about the genesis of the PowerPoint presentation was wholly incredible. In reaching that faulty conclusion, the ALJ manufactured an inconsistency where none existed, rejecting Allen's testimony that "[h]e sua sponte put together the very sophisticated PowerPoint presentation from his own online research and then presented it to employees on August 16 and 17—even though the owners had told him not to [. . .]" and finding Allen's testimony "was directly contradicted on cross-examination by the email [GC Ex. 14] that Ms. Hill sent to managers[2] on either August 11 or 12, showing that the owners and legal counsel approved of the presentation and were going to review it in advance."[3] (D. 8-9) A closer read of Allen's *complete* testimony and the plain language of Ms. Hill's August 12 email (GC Ex. 14) affirms that Spike's owners and Allen had always intended to educate putative unit employees

[2] The ALJ also erred in finding Ms. Hill sent this email to "managers" as it is undisputed recipient Bitner is a nonmanagerial administrative assistant working out of the ExxonMobil location. (V.877:8-15)

[3] The ALJ's unwarranted confusion about the email's send date notwithstanding, the email's header establishes Ms. Hill sent it on August 12, 2021 at 4:05 p.m. (GC Ex. 14).

about unionization through a PowerPoint presentation to be prepared and delivered by Allen. However, the salient point here, which the ALJ mistook for an inconsistency worthy of discrediting Allen completely, was a dispute between the Hills and Allen over the *timing* for Allen's anticipated delivery of the presentation to his employees *not* the delivery itself.

Both Allen's testimony and Ms. Hill's email (GC Ex. 14) reflect that Allen was supposed to prepare the PowerPoint and then wait for legal review before delivering the presentation to employees, but Allen disregarded the directive to wait for legal review and presented it anyway:

> JUDGE: Did you show it [the PowerPoint] to anybody else in management before you presented it? Did you show it to anybody in management before you went ahead with it?
>
> ALLEN: I did, yes. I sent it to Lee-Ann and Jeff [Hill].
>
> JUDGE: So you had their approval to present it?
>
> ALLEN: Not necessarily.
>
> JUDGE: Well, you didn't have their disapproval.
>
> ALLEN: Right. Well, not necessarily. **They wanted me to not do anything and wait for our attorney to tell us what to do next.** But I thought that at the beginning of this I didn't want people, you know -- **I wanted people to know that we were aware of what was going on because some time had already passed since the petition and nobody said a word**; but I was starting to feel everybody around the site, all the employees were just very, very tense and on edge. **So I wanted to hurry up and just jump out in front of this and say, hey, this is where we're at.** Don't want anybody to feel any different. This is just part of the process. Here we are. So I wanted to kind of alleviate everybody's tense behavior.
>
> JUDGE: Let me just clarify just so I make sure I understand. You prepared this slide presentation yourself, and did you tell the Hills that you were going to present a slide presentation or did you actually show them what you were going to present?
>
> ALLEN: I showed them what I was going to present.
>
> JUDGE: All right. That's fine.

R'S ATTY: And just to clarify, what did the Hills tell you after you showed this presentation to them?

ALLEN: They told me not to.

(VI.1169:4 – 1170:18) (emphasis added) Ms. Hill's email tells an identical story. It states, in relevant, part, "Dave [Allen] is the process of writing up a PowerPoint describing what benefits they have by not joining the union. **We will then pass it on to the attorneys to look over and approve *before* we send it out.**" (GC Ex. 14) (emphasis added). Because the factual foundation on which the ALJ built his credibility determinations does not rely on demeanor and is unassailably contradicted by the record, all findings and conclusions in the Recommended Decision predicated on Allen's purported lack of credibility (for example, the finding Spike violated 8(a)(1) based on the ALJ crediting Selby's account of the August 17 one-on-one meeting over Allen's account merely because the ALJ "found other aspects of Allen's testimony to be farfetched")[4] are fatally flawed and must be reversed.

2. Allen Never Reviewed the Signed Cards on August 11.

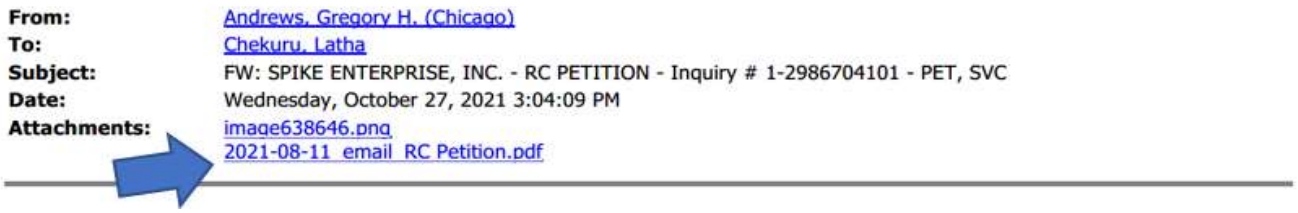
The ALJ incorrectly found that, on August 11, Allen had "actual notice" of the names of employees who signed authorization cards based on the ALJ's mistaken belief that "copies" of authorization cards were included in an August 11 email from the Union's administrative assistant to Allen about the representation petition filed that day. (D. 7:35). Although the Union's email mentions an attachment, the signed cards were never included. Rather, the Union forwarded to Allen the confirmation email it received from the NLRB's efiling system after submitting the petition and cards. Images of the signed authorization cards were not readily available for Allen's review from the body of that confirmation email, nor were they included, as the ALJ claimed, as

[4] (D. 10:9-12).

"attachment copies." (D. 7:17); (GC Ex. 6). Instead, to access and view copies of the signed cards, one would have to scroll to the end of the email chain and click on a hyperlink, which would take the user to the NLRB's website. Only at that point could one download a copy of the authorization cards for review. (GC Ex. 6). The record is devoid of any evidence that Allen ever saw or clicked that link. And even if Allen had seen and clicked on the link (he did not), there is similarly no evidence that Allen could have accessed the authorization cards from the NLRB's website, because no evidence exists suggesting he had NLRB login credentials.

as the ALJ claimed, as "attachment copies." (D. 7:17); (GC Ex. 6). A closer review of GC Ex. 6 proves that fact. Notably, General Counsel made the attachment to GC Ex. 6 called "2021-08-11 email RC Petition.pdf" available for review via hyperlink on pg. 1 of its exhibit (see figure 1, email header) rather than including a printed copy of the pdf attachment as part of its exhibit. That hyperlink is easily overlooked but when clicked, it reveals a nine-page document including the Union's petition, certificate of service, blank statement of position form, blank commerce questionnaire, and a description of R case procedures). The cards are *not* included in that document.

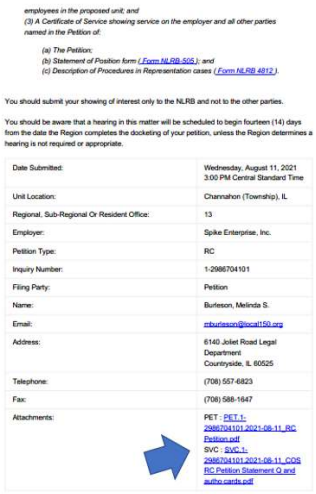
Figure 1, GC Ex. 6, p. 1, Email Header



Instead, to access and view copies of the signed cards, one would have to scroll to the end of the email chain and click on a hyperlink (see figure 2, efiling confirmation), which would take the user to the NLRB's website.[5]

[5] Note this hyperlink is now dead and instead directs to a govDelivery landing page.

Figure 2, GC Ex. 6, p. 5, E-filing confirmation email forwarded by the Union to Allen on August 11, p. 5



employees in the proposed unit; and
(3) A Certificate of Service showing service on the employer and all other parties named in the Petition of:

(a) The Petition;
(b) Statement of Position form (Form NLRB-505); and
(c) Description of Procedures in Representation cases (Form NLRB 4812).

You should submit your showing of interest only to the NLRB and not to the other parties.

You should be aware that a hearing in this matter will be scheduled to begin fourteen (14) days from the date the Region completes the docketing of your petition, unless the Region determines a hearing is not required or appropriate.

Date Submitted:	Wednesday, August 11, 2021 3:00 PM Central Standard Time
Unit Location:	Channahon (Township), IL
Regional, Sub-Regional Or Resident Office:	13
Employer:	Spike Enterprise, Inc.
Petition Type:	RC
Inquiry Number:	1-2986704101
Filing Party:	Petition
Name:	Burleson, Melinda S.
Email:	mburleson@local150.org
Address:	6140 Joliet Road Legal Department Countryside, IL 60525
Telephone:	(708) 557-6823
Fax:	(708) 588-1647
Attachments:	PET : PET.1-2986704101.2021-08-11_RC Petition.pdf SVC : SVC.1-2986704101.2021-08-11_CDS RC Petition Statement Q and autho cards.pdf

When considering the documentary evidence (that is, "2021-08-11 email RC Petition.pdf") proving copies of the signed cards were not attached to the Union's email and in view of the ALJ inadvertently overlooking a hyperlink (just as Allen did when receiving the Union's efiling confirmation), the ALJ's conclusion that Allen must have lied about not having reviewed the cards on August 11 proves unfounded and his determination that Allen was incredible, clearly erroneous. As a result, the ALJ's determinations that Spike violated Sections 8(a)(1) and (3) based on these fault credibility determinations are erroneous, unsupported, and should be not be countenanced.

B. SPIKE DID NOT VIOLATE SECTION 8(a)(1).

1. DAVID ALLEN NEVER THREATENED EMPLOYEES WITH A REDUCTION IN WAGES [Complaint ¶¶ V (a) and V(a)(i) and Exception 4 and 6].

The ALJ erred in two ways in finding that, during an August 16 group meeting, Allen unlawfully threatened employees with a reduction in wages if they chose the Union as their bargaining representative. (D. 9:38).

First, the ALJ's conclusion that Allen unlawfully deviated from the text of an otherwise lawful PowerPoint must be reversed because, in so finding, the ALJ inexplicably ignored record facts. It

is undisputed that Allen's PowerPoint presentation contained no language that violated the Act. (D. 8:39-40) GC witness Holland testified that Allen covered all of the points in the PowerPoint. (Tr. I.69:21-24) GC witness Dave Schell similarly testified that Allen "had a slideshow presentation that he spent some time on." (Tr. II.286:19-22) In response to questions from the ALJ, Schell testified that Allen "followed the presentation that was on the PowerPoint." (Tr. II.287:13-15) Bystander witness, Shelbi Bitner, likewise affirmed "I did not hear him [Allen] threaten anyone loss of job, hours, employment." (Tr. V.879:4-5) In total, six witnesses agreed that Allen read directly from the PowerPoint presentation, yet the ALJ inexplicably omitted any discussion of that testimony. Because the ALJ failed to weigh the evidence as a whole, the conclusion that Allen unlawfully threatened a loss of benefits on August 16 ignores the totality of the evidence and must be reversed. *See, e.g., Windsor Redding Care Ctr*., *LLC v. NLRB*, 944 F.3d 294, 299 (D.C. Cir. 2019) ("the Board may not totally ignore[] facts in the record[.]")

Second, the ALJ's conclusion that Allen threatened a reduction in wages (D. 9, 19-20) must also be reversed because it strays from well-reasoned Board jurisprudence. Context is key. Allen and his PowerPoint explained that wages are determined through collective bargaining, which "is a give and take process. You could end up with the same, more, or less." (GC Ex. 7, p. 9). The Board has long held that an employer can make predictions about the effects of unionization during an organizing campaign without violating the Act. *Telex Commc'ns*, 294 NLRB 1136, 1140 (1989) (employer lawfully told employees that bargaining involved give and take, that they would not necessarily receive higher wages and benefits, and that they might "win, lose, or draw" as result of bargaining). Because Allen did nothing more than lawfully predict the economic consequences of unionization, the ALJ's conclusion that Allen violated 8(a)(1) by threatening a loss of benefits during a group meeting on August 16 must be reversed.

2. ALLEN LAWFULLY EXPLAINED SPIKE'S RIGHTS WITH RESPECT TO STRIKING EMPLOYEES [Complaint ¶¶V(a) and V(a)(iii); Exception 6 and 11].

The ALJ made multiple, compounded errors when concluding that Allen made unlawful threats to the employees if they went out on strike that must be reversed, including reimagining Allen's testimony to be more threatening than it actually was, holding Allen responsible for certain other unlawful statements but failing to identify them, and misapplying Board law on an employer's right to explain the consequences of striking.

i. Allen never said strikers would lose their jobs.

First, the ALJ's determination must be reversed because Spike was unfairly prejudiced by an outcome determinant misquote of Allen's testimony. This misquote transformed an otherwise lawful presentation on unionization to a certain threat of discharge—a threat which multiple witnesses denied. (Tr.V.756:23-25, Tr.V.879:1-5). On cross examination, the General Counsel asked Allen whether he told the employees he "could" replace them if they went on strike for reasons other than unfair labor practices. (VII.1244:18-24). Allen answered, "I read some text [from a PowerPoint] along those lines." (Tr. VII.1244:24-25). In his recommendation, however, the ALJ concluded that Allen violated Section 8(a)(1) because, despite clear testimony to the contrary, the ALJ believed Allen said, "if they went on strike for anything else [other than unfair labor practices], they would be terminated." (D. 15) (emphasis added). Materially altering a witness' testimony in a manner that unfairly prejudices the outcome requires reversal. This material alteration of witness testimony—conflating "could be" and "would be" — unfairly prejudiced the outcome. As a result, the ALJ's unfounded conclusion that Allen violated 8(a)(1) by threatening discharge must be reversed.

i. Allen never made other threats that put the alleged threat to discharge strikers "in context."

Second, Allen never made any other threats of discharge that would justify the ALJ's conclusion that Allen told Selby that employees who went on strike would be discharged – which again, was already distorted by the ALJ. Without specifically identifying the unlawful statements, the ALJ wrote that Allen's threat to Selby "was in the context of other statements that suggested employees could lose their jobs if the Union was voted in, because of Spike's relationship with ExxonMobil." (D. 19:37-39). Allen lawfully explained the nature of the relationship between Spike and its customer, ExxonMobil in the PowerPoint, which the GC and the Union agreed did not violate the Act. (GC Ex. 7). In other words, the presentation presented stated the current rates ExxonMobil pays Spike to convey to the employees that, even if they unionized, benefits could go up, stay the same, or even go down. *Id.* It is well-settled that "the reality that employees may end up with less as a result [of unionizing], does not violate the Act." *Stabilus, Inc.*, 355 NLRB 836, 856 (2010). The ALJ failed to apply Board precedent to Allen's description of Spike's relationship with ExxonMobil. Allen never suggested employees would lose their jobs or have their benefits reduced, and so the ALJ erred when he found that Allen's alleged threat to Selby was made against the backdrop of other threats to employment.

ii. Allen was not obligated to explain the intricacies of *Laidlaw* to putative unit members.

Third, the ALJ erred on the law when concluding that Allen did not adequately explain the employees' right to reinstatement as economic strikers. Allen was not required to fully articulate the entire world of consequences that come with being an economic striker. Indeed, the Board in *Eagle Comtronics* held that "an employer may address the subject of striker replacement without fully detailing the protections enumerated in *Laidlaw*, so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those

detailed in *Laidlaw*." 263 NLRB 515, 516 (1982). In other words, "[a]s long as an employer's statements on job status after a strike are consistent with the law, they cannot be characterized as restraining or coercing employees in the exercise of their rights under the Act." *Id*. In *River's Bend Health & Rehabilitation Services*, the Board found that the employer did not violate the Act by telling employees that hiring replacements "put each striker's continued job status in jeopardy." 350 NLRB 184, 185 (2007). Allen's lawful PowerPoint stated, "We are allowed to replace any employee that goes on strike for economic reasons." (GC Ex. 7). This statement was not a threat – it merely explains Spike's qualified "right' to replace employees. At most, then, Allen put their job status in jeopardy, which is not unlawful. *See River's Bend*, 350 NLRB at 185.

iii. The ALJ's finding that Allen threatened strikers with job loss is unreasoned and unsupported by the record.

The conclusion that Allen violated 8(a)(1) on August 16 by not providing a "full explanation" of their rights to reinstatement under *Laidlaw* is based on a faulty premise imagined by the ALJ and must be reversed. (D. 19). Here, the ALJ claimed to base his finding on "the context of other statements that suggested employees could lose their job." (D. 19) But he identified no such "other statements" threatening loss of employment on August 16 (or any other day). And he cannot because none exist. Because the ALJ's conclusion here is unreasoned and lacks substantial evidence supported by the record as a whole, it must be reversed.

3. ALLEN NEVER THREATENED STRIKERS WITH DISCHARGE OR LOSS OF BENEFITS DURING HIS AUGUST 17 ONE-ON-ONE. [Complaint ¶¶ V(a) and V(a)(iv) and Exception 10 and 12]

The ALJ erred in concluding that Allen threatened employees with discharge during his August 17 one-on-one meeting with Selby. As discussed below, Shelbi Bitner directly contradicted Selby. She testified that Allen never threatened Selby with discharge if he or the other employees went out on strike. Bitner is not a member of management, and she is not a member of the putative

bargaining unit. Therefore, she is neutral witness with no skin in the game. As an initial matter, the ALJ completely ignored her testimony. The ALJ should have at least discussed this contradictory testimony, and in that analysis the ALJ should have given Bitner's testimony greater weight than Selby, who is a putative bargaining unit member, is out on strike, and has a financial interest in the outcome of this proceeding.

4. ALLEN NEVER TOLD EMPLOYEES SPIKE WOULD MORE STRICTLY ENFORCE THE RULES IN RETALIATION FOR THEIR UNION SUPPORT [Complaint ¶¶ V(a) and V(a)(iv) and Exception 10 and 12]

In concluding that Allen violated the Act by announcing to Selby in a one-on-one meeting that he would enforce the rules more strictly, the ALJ erred by unfairly and inconsistently applying credibility standards. The ALJ also erroneously adopted GC Witness Selby's testimony in its entirety, without considering the record as a whole—including contrary testimony from a bystander witness.

i. The ALJ ignored Board law and his own standard of review that witnesses on strike have a financial stake in the outcome.

The ALJ himself recognized that employees are more reliable when they testify against their pecuniary interest (D. 6:15-17). With that in mind, and despite the GC's request, the ALJ refused to apply this precept about testimony against interest to the GC's striking witnesses because, according to the ALJ, "[s]triking employees have a financial stake in the proceedings and stand to gain if the General Counsel prevails." *Id.* at 23-24. Although the ALJ correctly recognized that that the GC's striking witnesses are self-interested and stand to gain, he erroneously failed to apply that same reasoning to his findings.

ii. Bystander witnesses are inherently more credible yet the ALJ ignored relevant testimony from a disinterested witness about the August 17 one-on-one meeting.

Board precedent has established that neutral, third-party witnesses are generally more reliable and should be given greater weight than putative bargaining unit members or management. *See e.g. Christie Elec. Corp*., 284 NLRB 740, 744 (1987) (noting with approval "an apparently neutral witness whose credibility was not impeached."); *Grand Med. Transp., LLC*, 2015 NLRB LEXIS 884, *4 (2015) (approving "a neutral third-party witness with no stake in the proceeding, [who] had no reason not to testify truthfully."). Inexplicably, the ALJ credited in full the self-serving testimony of GC witness and striker Selby about his one-on-one meeting with Allen.

The ALJ's unexplained willingness to rely on Selby's testimony over Bitner's testimony renders his conclusions about the August 17 one-on-one meeting suspect. If the ALJ and GC are to be believed, Allen knew Selby signed a card, so it goes against common sense to believe Allen would make these comments to a union supporter. *See Candence Innovation,* LLC, 353 NLRB 703, 712 (2009) (Board found General Counsel did not meet its burden of proof and found it implausible that manager made alleged threats to an open union supporter). The Board has discredited witnesses exactly like Selby for "having the kind of prounion bias which impair[s] one's objectivity." *See Wabana, Inc.*, 146 NLRB 1162, 1185 fn. 29 (1964).

Finally, as discussed above, the ALJ's reversible errors were compounded by an improper rejection of Allen's contrary testimony about the August 17 meeting, a determination not based on an observation of Allen's demeanor, but rather based on the ALJ's cursory read of record evidence. These unsupported findings about the August 17 meeting must therefore reversed.

ii. The ALJ impermissibly failed to consider the record as a whole when he ignored Bitner's contrary testimony.

The ALJ also erred because his findings were more consistent with the role of an advocate than an adjudicator. He found Bitner to be credible and relied on her testimony where it supported General Counsel's witnesses and improperly ignored all her testimony to the contrary. *Permaneer Corp.*, 214 NLRB 367, 368 (NLRB) (criticizing the ALJ for ignoring testimony which undermined "the validity of the ALJ's credibility determinations"). For example, although Allen claimed he never made comments outside the scope of the PowerPoint, the ALJ relied on Bitner's testimony that she remembered him discussing both economic and ULP strikes (the latter of which was not mentioned in the PowerPoint). (D. 9:31-32). However, as discussed above, the ALJ then inexplicably ignored Bitner's testimony affirming Allen made the exact same presentation to Selby as he did to the group, an outcome determinant conclusion in Spike's favor. This kind of testimony cherry-picking renders ALJ's entire analysis unreliable and unworthy of credence. The ALJ is not permitted to disregard all contrary testimony that fails to support a predetermined narrative that Spike acted unlawfully. *See Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638, 642-43 (D.C. Cir. 2017) (granting employer's petition for review and denying General Counsel's cross-petition for enforcement where Board's opinion evidenced "a complete failure to reasonably reflect upon the information contained in the record and grapple with contrary evidence—disregarding entirely the need for reasoned decisionmaking."). As a result, the ALJ's findings and conclusions about Selby's August 17 one-on-one with Allen must be disregarded and reversed.

iii. ALLEN NEVER TOLD EMPLOYEES SPIKE WOULD NOT SIGN A CONTRACT, MAKING BARGAINING FUTILE [Complaint ¶¶ V(a) and V(a)(v) and Exception 9].

The ALJ's conclusion that Allen told employees Spike would not sign a contract must be reversed because the analysis was incomplete and unsupported by the record. As an initial matter,

the ALJ impermissibly failed to identify the exact statement that gave rise to this purported violation. He concluded that "[b]y making a statement tantamount to saying that selecting union representation would be futile, Allen violated Section 8(a)(1)" but omits from this conclusion the exact statement that he believed was "tantamount" to saying selecting union representation would be futile. (D. 20:27-28). The Parties are left to guess by looking elsewhere in his 34- page decision what alleged statement purportedly satisfied this allegation.

The ALJ's conclusory ULP finding ignored Allen's presentation, which the Parties agreed did not contain anything unlawful, which specifically stated that "[W]e don't have to agree to any contract" because "[c]ollective bargaining is a give and take process." (GC. Ex. 7). The PowerPoint accurately describes Spike's rights at the bargaining table. Spike is not obligated to agree to a contract, so long as it bargains in good faith. For example, in *Ready Mix Inc.*, a manager's answers to employees' inquiries that company was "not unionized or had no plans to go union or to be union" did not constitute coercive statements of futility regarding unionization where the manager did not state or imply that company intended to ensure its nonunion status through discriminatory or coercive means. 337 NLRB 1189 (2002). *Compare with Wellstream Corp*., 313 NLRB 698, 706 (1994) (company president statements that no "son of a bitch" would bring a union into Wellstream and that he would see to it that Wellstream was never unionized were clearly intended to and had the effect of conveying to employees the futility of their support for the union).

Nothing in the PowerPoint, and nothing about Allen's alleged additional comments can be interpreted as rising to the level of rendering the union effort futile. The key here is the qualifying sentence that Allen included in the PowerPoint that "[a]ll contracts must be approved by the company." *Id.* This language does not convey futility – as defined under the Act – rather, it represents an accurate description of the collective bargaining process and Spike's rights in that

process. Neither Allen nor the PowerPoint told the employees that Spike would change their terms and conditions of employment whether or not the employees were represented. Those are the kinds of statements that the Board has found violate the Act, but they are not the statements made by Allen. Because the ALJ failed to justify his conclusion beyond a single sentence about an undisclosed, purportedly violative statement, his finding that Allen made a statement about the futility of organizing must be rejected.

iv. ALLEN DID NOT SURVEIL OR HARASS NICK HOLLAND ABOUT A NON-EXISTENT UNION STICKER [Complaint ¶¶ V(a) and V(a)(ii) and Exception 13 and 14].

Although the ALJ correctly determined that Allen had not engaged in unlawful surveillance, the ALJ made three errors by concluding that Allen "harassed" Nick Holland, including (1) denying Spike due process and the ability to defend against a harassment allegation not asserted in the Complaint; (2) holding – contrary to Board precedent – that Allen's conduct rose to the level of unlawful harassment; and (3) failing to consider that Allen's apology disavowed any bad conduct.

As to the first error, the ALJ denied Spike due process when he *sua sponte* decided that Allen had harassed Holland, even though the Complaint alleged that Allen unlawfully "surveilled" Holland. (GC Ex. 1). The ALJ violated Board law when he unilaterally "updated" the Complaint with an allegation he deemed more appropriate once he heard the testimony. The Board held in *Factor Sales* that allegations must provide "meaningful notice" and a "full and fair opportunity to litigate" to satisfy procedural due process. *Factor Sales*, 347 NLRB 747, 747-48 (2006). The Board further explained that "[i]t is axiomatic that a [party] cannot fully and fairly litigate a matter unless it knows what the accusation is." *Id.* The ALJ waited until he issued his decision, after the trial was over and the record closed, to manufacture this new allegation against Spike. Therefore, Spike

did not have meaningful notice to fairly litigate a harassment claim. Spike was likewise denied an opportunity to examine both Holland and Allen based on a harassment claim. The ALJ's conclusion that Allen "harassed" Holland is based on a flawed analysis that deprived Spike of its rights.

As to the ALJ's second reversible error, Allen's request that Holland remove the Local 150 sticker did not rise to the level of harassment. The only conclusion possible to draw from the record is that Allen simply made a request that Holland remove a sticker Allen later realized did not exist, which he apologized for. Holland never even testified that he felt harassed or threatened. Holland testified that their interaction was brief, and at most Allen twice asked Holland to remove to the sticker. (D. 8:23-26). As an aside, the ALJ went out of his way to hold that he would draw an adverse inference against Allen for not testifying about this event; however, there was no need for Allen to testify about the event if his testimony would not have been in dispute with Holland's account. In any event, Holland openly disputed Allen's claim, and Holland agreed to take a quick walk around the truck to show him that Holland did not know what Allen was talking about. *Id.* at 25-27. According to Holland, once Allen realized he was wrong, he quickly apologized, and the interaction ended. *Id.* at 29.The ALJ improperly held Allen's request to be harassing despite the fact that Allen's conduct did not come close to the level of harassment that would interfere with Holland's Section 7 rights. Further erring, the ALJ's conclusion is not supported by the Board precedent on which he relied. The ALJ cited *Miklin Enterprises, Inc.* to support his manufactured allegation that Allen harassed Holland. (D. 21:13 citing 361 NLRB 283, 290 (2014)). *Miklin* is completely distinguishable. There, in relevant part, the Board upheld the ALJ's finding that the employer violated Section 8(a)(1) when a manager encouraged employees to harass a known union supporter "by means of postings on the antiunion Facebook page." *Id.* The ALJ there found that

the employees used "disparaging, crude, and profane language." Nothing about this case falls within *Milkin*. Holland never testified that Allen disparaged him or cursed at him. There is no dispute that their encounter was brief, that Holland maintained his innocence, and that Holland volunteered to walk Allen to the truck to show him he was wrong. Allen's immediate apology is similarly undisputed.

The ALJ's analysis is also erroneous because it makes an illogical leap unsupported by the record. In concluding that Allen "harassed" Holland, the ALJ claims that "[t]he fact that no sticker was found strongly suggests that Allen had an improper motive rather than a good-faith belief." (D. 21:13-14). This conclusion is contrary to the testimony. Since Holland testified that once Allen realized his mistake he apologized and the two separated, it is more likely that Allen truly believed that a sticker had been placed on the truck – which Spike does not have to tolerate. *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995) ("An employer has the right to restrict access to its [company property]."). If Allen had known all along that the sticker was a plot to harass Holland – as the ALJ concluded – it defies common sense that Allen would stop "harassing" him once they walked around the truck and then apologize to the same person he was allegedly harassing.

As to the ALJ's third error, even if Allen had unlawfully "harassed" Holland (he did not), a party otherwise guilty of engaging in unlawful conduct can disavow that conduct by a later apology. The Board established more than 40 years ago in *Passavant* that an employer may repudiate an unfair labor practice if it is "timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct." *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Here, there was no delay (possibly just a few minutes) between the allegedly unlawful conduct and the apology to Holland. (D. 8:29-30). *See DHL Express (USA), Inc.*, 2013 NLRB LEXIS 262, *49 (NLRB) (applying *Passavant* and holding that "adequate publication"

means "to the employees involved."). Holland also testified that once Allen apologized, both men simply went their separate ways. (Tr. I.59:11-15). Allen clearly apologized for conduct that, as discussed above, did not even rise to the level of harassing conduct under the Act. Holland acknowledged the apology in his testimony, and Holland never claimed that the apology was insufficient. As such, the ALJ's erroneous conclusion that Allen "harassed" Holland must be reversed.

C. RESPONDENT DID NOT VIOLATE SECTION 8(a)(3) OF THE ACT.

1. SPIKE DID NOT VIOLATE THE ACT WHEN IT DISCHARGED ROSSEY FOR MULTIPLE, CONSECUTIVE SERIOUS SAFETY VIOLATIONS [Complaint ¶¶ V(a) and V((b)(i)-(ii) VI (a), VI(c) and Exceptions 7, 8, 18, 19, 20, 24, 25, 26, 27, 28, 29, 30, 31, 32,and 33].

The ALJ erred in many ways when concluding Allen discharged Rossey for engaging in Section 7 activities and his findings, which are unsupported by the record and evince a desire to dispense his own brand of industrial justice, should thus be reversed.

First, the ALJ went to great lengths to excuse Rossey's admitted misconduct by downplaying or outright ignoring unrefuted evidence of Spike's culture of safety, including its hydrogen sulfide gas (H2S) exposure protocols. The record is replete with testimonial and documentary evidence – both of which hardly made their way into the ALJ's decision – showcasing Spike's comprehensive training requirements. In fact, the ALJ section titled "ExxonMobil requirements for new Spike employees" covers a measly 5 lines in his decision, and only mentions without serious explanation of ExxonMobil's new to site test. Spike and ExxonMobil's commitment to safety, including its maintenance of comprehensive written policies and substantial training, support Allen's claims about the events on August 12, but they are nowhere to be found in the ALJ's decision.

Before employees are even allowed on to the jobsite, they are required to attend an initial, multi-day training in Joliet, Illinois with Three Rivers (a subcontractor that provides safety training

to all workers at the ExxonMobil refinery). (Tr. VII. 1063:3-12; R. Ex.102). The Three Rivers training covers H2S training, "hole watch," and other more specialized tasks. (Tr. VII. 1064:3). The record further reflects that alleged discriminees Rossey and Cody Franzen both took Three Rivers classes and examinations as required. (R. Ex. 86, 102). The safety topics discussed at these meetings are codified in written policies maintained by ExxonMobil covering H2S gas. (Resp Ex. 11). ExxonMobil's H2S training is particularly salient because, as Jeff Mathis explained, "you don't want [H2S] to hit your face because if it hits you, then it can kill you." (Tr. V. 730:7-9); (Tr. II. 320:5-6).

Pursuant to these policies, multiple employees testified that they had received prior written warnings or safety violations, including Rossey. In fact, Spike assessed Rossey a safety violation for failing to wear a seatbelt in November 2018. (Resp Ex. 37). In February 2020, Allen orally coached Rossey during a safety audit that revealed safety problems with (1) wheel chocks, (2) grounding the truck, (3) locking pins, (4) not wearing rubber gloves, and (5) not wearing a faceshield. (R. Ex. 36). Finally, in April 2021, Rossey improperly secured a valve resulting in 200 gallons of hazardous waste spilling on to the ground. (R. Ex. 23). In July 2021, Rossey was given a written warning for falling asleep in a truck. (GC Ex. 15). The ALJ ignored the safety policies and these other incidents of discipline except for Rossey's spill, which the ALJ used to further is conclusion that Allen treated Rossey differently on August 12, in contradiction to the safety evidence as a whole. *Merillat Industries, Inc.,* 307 NLRB 1301, 140 (1992) ("[I]t is rare to find cases of previous discipline that are 'on all fours' with the case in question, and the Respondent should not be faulted for being unable to show that it had discharged an employee" in exactly the same circumstances); *Int'l Baking Co.,* 348 N.L.R.B. 1133, 1138 (2006) ("[I]t is not the law that an employer can prevail only by showing prior identical misconduct and discipline.").

The ALJ did not just ignore testimony on safety procedures, but he also mischaracterized and misinterpreted testimony and proper safety procedures. The ALJ held that "EPNR [(an emergency response team)] is not always called and does not necessarily come to the site" of a hydrogen sulfide (H2S) exposure including on August 12, the day that Rossey was discharged. (D. 12). This does not accurately reflect Allen's testimony. When asked whether he had ever not called EPNR when there was an H2S meter hit, Allen replied, "No." (Tr.VII.1118:10-12). Allen clarified that on August 12 he did not call EPNR immediately because Rossey failed to report the meter hit at the time it occurred, and so he "didn't have any information to share" with EPNR. (Tr.VII.1118:19-24). Instead of contacting EPNR immediately, Allen acted according to procedure when he prepared a form to report the meter hit as a "Near Loss" incident" that same day. (Tr.VII.1099:5-14).

The ALJ's failure to realize that EPNR can only be called when an H2S meter hit is actually reported (which is why Allen did not call EPNR immediately that day), and the faulty related conclusion that Allen must have acted differently in that situation because he harbored antiunion animus unfairly prejudiced Respondent. Because of Rossey's misconduct in failing to immediately report the meter hit, Allen did the only thing he could by later reporting the meter hit as a "Near Loss" incident. This is neither evidence that Allen harbored anti-union animus nor an appropriate reason to discredit his testimony. The ALJ ignored the evidence and common sense when he failed to realize that Allen cannot simply call EPNR to report past meter hits because past hits cannot be corroborated with a specific date, time, and location. Rossey's failure to report the hit prevented an EPNR response.

The ALJ further failed to grapple with contradictory testimony when laying the foundation for the Section 8(a)(3) allegation regarding Rossey in violation of the Court's decision in *Fred Meyer*,

where the DC Circuit criticized the Board for failing to "grapple" with contradictory testimony. 865 F.3d at 638. The ALJ held that "Rossey testified without contradiction that he…had meter hits right before lunch on August 10." (D. 14:44-46). Allen directly contradicted this testimony. Allen testified that he noticed Rossey's meter was off, and so he asked Rossey why his meter was not turned on. (Tr. VII.1139:3-4). Since Rossey's meter was still off, it was impossible for Rossey to have had a meter hit before speaking with Allen because Rossey's meter does not turn off once activated. (Tr. VII.1140:9). Therefore, before that moment, Rossey could not have had a meter hit. The ALJ did not even bother addressing this testimony, instead simply concluding that Allen testified "without contradiction." The ALJ cannot ignore testimony without any explanation at all as to why he did not credit Allen's patently contradictory recollection of events. Because the ALJ's findings were more consistent with the role of an advocate than an adjudicator, they must be reversed.

Second, the ALJ improperly reviewed separately each of Rossey's four safety violations, all of which occurred nearly simultaneously on August 12 when declaring Spike's legitimate, non-retaliatory explanation for Rossey's termination pretextual. The ALJ's approach ignored the fact that these four safety violations occurred in rapid succession within moments of each other. Each infraction individually might not have been sufficient to warrant discharge over discipline, but when combined and considered in their totality, they critically undermine ALJ's conclusion that disparate treatment based on anti-union animus occurred. (D. 22-23). *See Advanced Masonry Assocs., LLC v. NLRB*, 781 Fed. Appx. 946, 951 (11th Cir. Aug. 16, 2019) (an employer only violates the Act by more strictly enforcing policies "*in retaliation for union activity*" or by enforcing rules "*selectively to discriminate*") (emphasis added). Indeed, although the ALJ asserts animus must be inferred because none of the employees knew of any employees other than Rossey

who had been "terminated for having H2S meter hits, not reporting them quickly, and not wearing FRC [fire resistant clothing]," his conclusions must be reversed because they again miss the mark.

Ignoring, for the moment, the ALJ's fundamental misunderstandings of the facts underlying Rossey's discharge (e.g., Rossey was not disciplined for merely "having" a meter hit) and the realities of Spike's business,[6] it is equally as likely that no employee knew of anyone other than Rossey who had been terminated under similar circumstances because no Spike employee has so brazenly put their own health and safety at risk in as many ways as Rossey did on August 12. Indeed, five employees (Garner, Schwartz, Martz, Mathis, and Jesiolowski) testified that they had never seen anyone in refinery *process areas* without their FRC. The only employee (other than Rossey) who Allen had witnessed *in a process area* without his protective gear (FRC) received a written warning for it and was sent home for the day. Even so, the ALJ inexplicably and erroneously discredited the testimony of Garner, Schwartz, Martz, Mathis, and Jesiolowski about FRC as "implausible" because he assumed, without support, that none wanted to admit that they or others have on occasion violated the policy. Instead, the ALJ credited Holland, Rossey, Schell, and Selby who all – according to the ALJ – all testified to removing their FRC "*when inside their trucks coming from or going to a job*." (D. 15) (emphasis added). The ALJ's does not accurately represent Holland's testimony. Instead, according to Holland, employees are "required to wear [FRC] pretty much everywhere in the refinery." (Tr. III. 446:22-23). In fact, when asked whether there are times in his job he does not need FRC, he replied that "you're really supposed to have it

[6] The ALJ's focus on Spike's lack of comparator discharges for "having H2S meter hits, not reporting them quickly, and not wearing FRC" (D. 22) as proof of unlawful animus is both illogical and misplaced in context. Allen is Spike's *only* statutory supervisor. He is responsible for managing three separate worksites located miles apart. The ALJ's failure to realize that employees might have removed their FRC when inside their trucks but were never disciplined because Allen was simply not there to see it undermines his finding that Spike treated Rossey differently based on anti-union animus.

all the time" except while eating lunch in the trailer or smoking" in the designated smoking shed near the office trailer and not in the process area. (Tr. I. 92:16-21).

Even putting the ALJ's misrepresentation of Holland's testimony aside, this is an improper, apples to oranges comparison that should be afforded no weight because Holland, Rossey, Schell, and Selby never testified to removing their FRC *in process areas* like Rossey did on August 12. In overlooking this important distinction, the ALJ failed to recognize the principal hazards at refineries are flashfire and inhalation of toxic gas. Although removing fire resistant clothing (FRC) in the truck coming from and going to jobs as Holland, Rossey, Schell, and Selby claim to have done on hot summer days violates Spike Enterprise's Safety Manual (Personal Protective Equipment (PPE) Program, it does not have the same immediate, *life or death* consequences as removing one's fire resistant clothing *in refinery process areas* full of highly combustible products with low flash points.[7] (Resp. Ex. 3).

Third, the ALJ also erred by substituting his unreasoned judgment for that of management when he relied on Allen's decision not to terminate Rossey's employment for his 200 gallon spill in April as evidence that Allen's August 12 termination decision must have been motivated by anti-union animus. (D. 23). Again, this reflects the ALJ's fundamental misunderstanding of the facts and Spike's business. Although the ALJ apparently believes that Rossey's admitted misconduct on August 12 was, in fact, a lesser offense than the 200 gallon spill, that ignores the realities of the oil and gas industry. Spills happen as a matter of course, which is why industrial cleaning businesses like Spike and tools like vacuum trucks exist. Rossey's April spill was egregious but unintentional. His safety violations on August 12 were blatant and willful. Allen was

[7] Notably, ExxonMobil's PPE program also requires employees to wear FRC in the truck because, although a less intensive form of PPE is required in "administrative areas," which includes vehicles, the employees must don PPE "before entering Process Areas."_. (Resp Ex. 39).

right to impose a harsher consequence on August 12 and the ALJ committed reversable error in substituting his judgment for that of management. *See NLRB. v. Audio Industries, Inc.*, 313 F.2d 858, 861 (7th Cir. 1963) ("The Board may not substitute its judgment for that of the employer as to the selection and discharge of employees.").

Fourth, the ALJ's emphasis on the timing of Rossey's discharge (one day after the petition) and his insistence that Allen must have known the identity of those who signed cards erroneous distracts from the real issue.[8] Even if Allen had seen the cards on August 11 (he did not), whether Allen knew Rossey signed a card is irrelevant to the *Wright Line* analysis because no one disputes Rossey was wearing his short sleeve Local 150 shirt in the process area on August 12 instead of lifesaving fire resistant clothing (FRC). (Tr. III.425:16; VII.1148.20)

Fifth, and as discussed herein, the ALJ's credibility determinations about Allen must be reversed because the underlying factual premises upon which they are based—that is, that Allen actually received the cards rather than a hyperlink on August 11 and that Allen was told not to prepare a PowerPoint and did it anyway—are untrue. *See Framan Mechanical Inc.*, 343 NLRB 408, 408 (2004) (reversing the ALJ where the Board disagreed with his findings). (Tr. VI.1169:4 – 1170:18). Relatedly, where Allen gave very-specific testimony, the ALJ deviated from his prior practice of giving greater weight to more specific testimony. For example, the ALJ credited Selby that he was with Rossey on August 12, even though Allen said he was not. (D. 13:27-29) The ALJ never explained why he credited Selby. More concerningly, the ALJ omitted any reference to the fact that Allen identified the exact truck and location where Selby had been working. (Tr. VII 1156:15-17)

[8] As discussed above in Section _, the ALJ spent considerable time and energy chasing this red herring argument about suspicious timing where the documentary evidence proves the signed cards were not attached to the email Allen received from the Union on August 11.

At bottom, the ALJ's findings as to Rossey's discharge are not supported by the record as a whole. When those faulty conclusions are properly cast aside, it is clear that Spike proved by preponderance of the credible evidence that it would have discharged Rossey regardless of his union activities. Thus the ALJ's determination that Spike violated 8(a)(3) and (1) by terminating Rossey's employment must be reversed.

2. SPIKE DID NOT VIOLATE THE ACT WHEN IT DISCHARGED FRANZEN FOR TWICE FAILING THE NEW-TO-SITE TEST AFTER BEING TOLD THE ANSWERS. [Complaint ¶¶ V(a), VI(b), VI(c), and VI(ib)(i)-(ii)and Exceptions 34, 35, 36, 37].

Although the ALJ correctly determined "[t]here is no evidence of specific animus against Franzen for engaging in union activity," he erroneously inferred, from circumstances unique to Franzen and out of Spike's control, that Spike nonetheless harbored anti-union animus and discharged Franzen for illegitimate reasons. (D. 24)

First, the ALJ incorrectly determined General Counsel met its *Wright Line* burden by relying on inferred animus. (D. 24:26-27) In so holding, the ALJ unreasonably relied on the fact that Allen rather than Jesiolowski administered Franzen's "new-to-site" test ("NTST")[9] and that no one other than Franzen has failed. Indeed, although much was made of Allen proctoring Franzen's NTST rather than Jesilowski, the usual proctor, the totality of evidence establishes it was urgency, *not animus*, that motivated the change in proctors.

On August 16, the day Franzen's badge was set to expire, Bitner notified Allen that Franzen had not yet completed the NTST and his badge would be expiring. In response, Allen contacted ExxonMobil security and the contractor safety committee, who gave Spike a one-day extension so Franzen could complete the NTST. Because time was of the essence [and Jesilowski was

[9] The NTST is required by Spike's customer, ExxonMobil, and tests the examinee's knowledge of site-specific safety protocols. Per ExxonMobil safety policy, ExxonMobil requires a score of 100% to pass. Examinees receive two opportunities to pass. Those who fail are banned from working on ExxonMobil's property for six months.

unavailable See GC EX 5], Allen administered Franzen's test the next day. Anti-union animus had nothing to do with it.

Second, the ALJ's conclusion that Allen harbored unlawful animus because he did not provide Franzen with the same level of assistance that other employees have received from Jesiolowski on a regular basis is similarly erroneous and unsupported by the record as a whole. (D. 24). Both Allen and Franzen testified that, after Frazen failed the test, Allen reviewed the answers with Franzen. (Tr. II. 202:25, 203:1-2, 206:3-9; Tr. VII. 1185:14-17) It is undisputed Allen again reviewed the correct answers with Franzen minutes before the second test. The ALJ simply explained that Allen "show[ed]" Franzen "which ones he got wrong." Allen did much more than that, At the end of the day, it was up to Franzen to ensure he passed his NTST. Allen cannot be faulted for Franzen's inability to retain key safety information spoon-fed to him just minutes before the second test. (Tr. II. 202:25, 203:1-2, 206:3-9) Thus, the ALJ's inferences of unlawful animus and the corollary conclusion that Franzen's discharge violated 8(a)(3) and (1) are erroneous, not based on the totality of the evidence, and must be reversed.

Third, the ALJ's determination that animus can be inferred from the timing of Franzen's test just a week after the petition is erroneous and must be reversed for obvious reasons—Spike had no control over the Union's filing date (August 11) or the ExxonMobil's testing deadline. Spike hired Franzen on July 15 (Tr. II.181:24). ExxonMobil requires that all new-to-site workers successfully complete their NTST no later than 30 days after starting on-site at the refinery; however, ExxonMobil permits new-to-site workers to take their test any time between day 15 and 30. (Tr. VII. 1065:9-11). Thus Franzen needed to successfully complete his NTST between approximately July 30 and August 16. There is nothing insidious about this timing of Franzen's

test nor was its timing in any way causally connected to the Union's petition. As a result, the ALJ's finding of animus based on timing must be reversed.

Fourth, the ALJ's baseless inference of animus must also be reversed because, as the ALJ recognized when charging Allen with knowledge of Franzen's union activities, "the resume that Franzen presented to Allen at his interview had as an objective to '*get started on the path to become an operating engineer.*'") (D. 24:13-14) (emphasis added); (see CP. Ex. 1). Despite this knowledge, Allen hired Franzen anyway. The ALJ's inference defies common sense and is contradicted by his own findings. If Allen truly bore anti-union animus (he did not), he never would have hired Franzen in the first place. *See Johnson v. Zema Sys. Co*rp., 170 F.3d 734, 744-45 (7th Cir. 1999) ("where the same person does the hiring and firing of an individual, an inference arises that the firing did not result from an improper discriminatory motive.") He likewise would not have tried to find Franzen work on Spike's team at Citgo. (Tr. VII. 1197:1-11).

D. THE ALJ IMPROPERLY AND INCONSISTENTLY DISCREDITED SPIKE'S OTHER WITNESSES WITHOUT REGARD TO THE CLEAR PREPONDERANCE OF ALL RELEVANT EVIDENCE. [Complaint ¶ V(a) and Exception 17]

In conducting his Section 8(a)(3) analysis, where Spike's witnesses' testimony failed to conform to the ALJ's preconceived belief that Spike was a "bad apple," the ALJ drew unwarranted inferences to sustain that narrative. *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990). For example, when discussing the extent to which employees knowingly violated Spike's safety policy regarding fire resistant clothing ("FRC"), the ALJ summarily dismissed Spike's five witnesses, a neutral bystander witness in Bitner, and 56 pages of Respondent's exhibits governing the site's safety rules. (D. 15). The ALJ found their testimony "highly implausible," simply because the ALJ thought that, as current employees, they would not want to admit that they or others violated the policy. *Id*. There is no evidence that Spike's witnesses were lying or reluctant to testify truthfully

about safety matters, yet the ALJ discredited them based on his belief that, just because they were current employees, they must be scared to testify truthfully.

In a related incident, Spike called Roy Garner, Wesley Martz, Jeffery Mathis, Daniel Matis, and Shayne Schwartz. Every one of them testified that Allen did not make any threats during the group presentation. The ALJ concluded that their testimony was "cursory" simply because they were "reticent to fully detail everything they recalled." (D. 9:20-22). Once again, the ALJ substituted his own judgement to explain away facts that did not support the GC's claim that Allen acted unlawfully under the guise that Spike's witnesses were too scared to testify truthfully. The ALJ must not be allowed to ignore testimony that supports Spike by claiming where convenient and without justification that the witnesses omitted facts. There is no evidence Garner, Martz, Mathis, Matis, or Schwartz feared retaliation and gave incomplete responses during examination. When the ALJ quoted the Board that, "when credibility resolution is not based on observations of witnesses' testimonial demeanor, the choice between conflicting testimonies rests," among other things, established or admitted facts, it was mere lip service. (D. 6:3-4).

As to the Section 8(a)(1) claim regarding Franzen's new to site test, the ALJ blatantly cherry-picked testimony that otherwise would have supported Spike's position. As discussed throughout, just as "the Board may not totally ignore[] facts in the record," the ALJ cannot ignore facts either. *Windsor Redding Care Ctr*., *LLC v. NLRB*, 944 F.3d 294, 299 (D.C. Cir. 2019).More specifically, Spike had pointed out in its post hearing brief that Holland testified that he did not know a single answer on the new to site test. Indeed, Holland claimed that he "didn't know a single [answer on the new-to-site test]," even though he took Three Rivers training. (Tr. I. 98:13-15, 137:21-23). It is beyond comprehension that, after receiving the training and working 30 days, Holland could claim he did not know a single answer on a test that includes questions like number 28, which

asked whether "illegal contraband may be kept in vehicles parked in parking lots." (Tr. I. 153:13-19). In fact, when asked about that question specifically, he claimed he did not know that. (Tr. I. 153:13-19).

When faced with this testimony, the ALJ rationalized that "Holland's testimony on cross-examination was more plausible." (D. 18:17-18). Apparently, the ALJ did not believe Holland's testimony either, but instead of discrediting Holland or concluding that the level of assistance Allen provided was consistent with the employees' historical performance on the test, the ALJ cherry-picked Holland's "more plausible" testimony on cross-examination that "on some questions, [Holland] put down partial answers, and Jesiolowski helped him to finish them." In sum, according to the ALJ, that version of events was "consistent with Jesiolowski's testimony." *Id*. at 18:21. The ALJ had throughout his decision, and discussed above, found Spike's witnesses not credible because he did not believe their testimony, but when Holland's testimony was not "plausible," the ALJ ignored it. This violated established Board law.

Finally, the ALJ erred twice with respect to the meetings held by consultant Ahmed Santana. First, the ALJ should not have drawn an adverse inference against Spike Spike for Jeff Hill not testifying about the meeting because Hill was not there. *Mitchell v. Colvin*, No. 13 CV 50209, at *16 (N.D. Ill. Sep. 8, 2015) ("A mistaken belief about the facts cannot serve as a basis for an adverse credibility determination."). There is no evidence that Hill ever attended that meeting other than Schell's testimony which – as discussed below – is unreliable. Instead, Hill testified about meetings he led in the days leading up to the election. Although the ALJ ultimately found that the Santana meetings did not violate the Act, the ALJ's willingness to make adverse credibility findings against witnesses that were not at meetings taints his analysis elsewhere in his decision.

The ALJ also disregarded Schell's repeated, admitted, doubt about his recollection of the Santana meeting. In other words, Schell explained that confusing the meetings held by Hill and Santana was "a concern of" his. The ALJ never addressed Schell's admitted worry. Instead, the ALJ concluded that Schell "testified in more detail." (D. 11:5). It defies common sense that Schell could admit he is concerned about confusing two meetings and then the ALJ turns around and credits his testimony as more detailed. These are both examples of the ALJ's inconsistent credibility determinations between the GC's and Spike's witnesses, and raise doubts about the veracity of his entire decision.

E. THE ALJ'S *GISSEL* ANALYSIS WAS INCOMPLETE, ERRONEOUS, AND UNSUPPORTED BY THE RECORD.

The ALJ's *Gissel* analysis is erroneous in at least three ways requiring its reversal. First, it and the ALJ's ULP findings hinge on improper credibility determinations about Allen that run contrary to documentary record evidence. Second, it failed to properly apply Board law. Third, it disregarded other relevant record testimony and evidence without explanation. As a result, the Board must overrule these erroneous findings unsupported by substantial evidence on the record. *See, e.g.*, *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950) ("[I]n all cases which come before us for decision we base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings.")

F. THE ALJ'S *GISSEL* ANALYSIS AND RELATED BARGAINING ORDER REMEDY ARE ERRONEOUS AND MUST BE REVERSED BECAUSE THEY ARE PREDICATED ON FAULTY CREDIBILITY DETERMINATIONS UNSUPPORTED BY THE RECORD. [COMPLAINT VIII(c), and EXCEPTIONS 38 - 44]

For the reasons discussed throughout this brief, the ALJ's conclusion that Spike engaged in myriad "hallmark" unfair labor practices in the week after the petition was filed is not based in fact or law. (D. 26:43-35) Without credible evidence of Spike's "hallmark" unfair labor practices,

the ALJ's determination that this is a Category II *Gissel* case appropriate for a bargaining order cannot stand and must be reversed.

G. THE ALJ'S *GISSEL* ANALYSIS IMPROPERLY STRAYED FROM LONGSTANDING BOARD PRECEDENT.

Even if the Board finds Spike engaged in some unfair labor practices (it did not), the ALJ's *Gissel* analysis is still fatally flawed and the Board should reject it because (1) the General Counsel has not met its burden to prove Spike's alleged pervasive unfair labor practices undermined majority strength and irretrievably impeded election processes warranting consideration of a *Gissel* bargaining order; (2) the ALJ failed to fully evaluate all *Gissel* factors including the extent of dissemination and number of affected employees; (3); and (4) the ALJ never considered the effectiveness or availability of traditional remedies as *Gissel* demands. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614-615 (1969).

1. The ALJ's *Gissel* analysis unjustifiably assumed General Counsel met its burden under *Gissel* and ignored credible record evidence proving Spike's purported misconduct did not affect laboratory conditions. [Complaint V(a) and Exception 19

Before considering the appropriateness of a *Gissel* bargaining order, General Counsel needed to prove Spike's pervasive unfair labor practices tended to undermine the Union's majority strength and destroy election conditions. It did not. For that reason alone, the ALJ's *Gissel* analysis is flawed and should not be countenanced. Instead, the totality of the circumstances and the preponderance of all relevant record evidence prove that a majority of Spike's employees simply did not want the Union and Spike had nothing to do with it. (GC. Ex. 9) Indeed, the General Counsel's only evidence of alleged majority support is the signed authorization cards. However, signed authorization cards alone cannot demonstrate majority support since card majority "has little significance." *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983) ("Workers

sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back.); *see also Montgomery Ward & Co., Inc. v. NLRB*, 904 F.2d 1156, 1162-1163 (7th Cir. 1990) ("On average 18% of those who sign authorization cards do not want the union. They sign because they want to mollify their friends who are soliciting, because they think the cards will get the dues waivers in the event the union should prevail, and so on. . . . On average, then, we expect to see- and do see-substantial slippage between the cards and the votes . . . When unions get between 50% and 70% of the cards, they win only 48% of the elections.")

Moreover on, August 30, 2021, putative unit member Lundberg began circulating a Decertification Petition, which ultimately thirteen employees joined. GC. Ex. 4. Although the ALJ correctly recognized Spike had nothing to do with that "decertification petition" and, despite evidence in the record that the four putative unit employees who at first signed cards and later signed the "decertification petition" had well-reasoned explanations unrelated to Spike's purported ULPs for changing their minds about the Union, the ALJ unapologetically declared those facts irrelevant. (D. 26:5-9) Instead, he held that a bargaining order is appropriate where unfair labor practices tend to cause a loss of majority support, "[r]egardless of [Respondents witnesses'] testimony of why they changed their support for the Union." (D. 26:6). This failure to even consider testimony that some employees changed their support for the Union for lawful reasons is erroneous and must be reversed.

Finally, contrary to the ALJ's findings, the record is clear that no matter if Spike committed ULPs (it did not), support for the Union was ultimately unimpacted. Seven employees went out on strike on August 20. (IV. 660:20,21). It is likewise undisputed that at most, "seven to nine" employees attended the union's meetings before the petition was filed on August 11. I. 49:15-24;

see III. 424:4 (Rossey testified the number of employees peaked at seven)). Because support for the Union remained consistent and, just as "the Board may not totally ignore[] facts in the record," the ALJ cannot ignore facts either. Because the ALJ unjustifiably ignored relevant, contradictory testimony establishing Spike's purported misconduct never caused a loss of support in contravention of longstanding Board precedent and insufficiently applied Board law to the facts, the bargaining order must be reversed. *See Windsor Redding Care Ctr*., *LLC v. NLRB*, 944 F.3d 294, 299 (D.C. Cir. 2019) ("the Board may not totally ignore[] facts in the record[.]"

2. The Decision erroneously omits any discussion of dissemination and number of affected employees.

Even if the General Counsel established the appropriateness of considering a *Gissel* bargaining order remedy (it did not), the ALJ's determination that a bargaining order is appropriate must still be rejected because his *Gissel* analysis was incomplete and failed to appropriately consider dissemination and the number of affected employees.

Dissemination is a uniquely important factor in the *Gissel* analysis and the General Counsel's burden of proof, and yet the ALJ failed to opine on the extent – or lack thereof – of dissemination of alleged unfair labor practices ("ULPs"). (D. 26:11-14 citing *Bristol Industrial Corp.*, 366 NLRB No. 101, slip. op. at 3 (2018)); *see David Saxe Prods.*, LLC, 2019 NLRB LEXIS 473, *238-239 (NLRB 2019) ("Where the employer's unfair labor practices neither affect or are disseminated to a significant portion of the bargaining unit, a bargaining order will be deemed unnecessary and therefore inappropriate.") Considering the number of affected employees is likewise important, yet the ALJ gave that factor no consideration.

Instead, the ALJ simply assumed dissemination and widespread effects on the putative unit contrary to the record evidence and without discussion when finding a bargaining order appropriate under *Gissel* Category II by relying mainly on the size of the unit (23) and the timing of Spike's

discharges of Rossey and Franzen in the week after the petition was filed to support such an extraordinary remedy. (D. 26:30-32, 26:43-45). The ALJ's reliance on timing and unit size as to Spike's alleged 8(a)(3) violations is improper here because many employees were told and believed that Rossey and Franzen had, in fact, been terminated for legitimate reasons. In the period after he was terminated, Mathis "heard [that Rossey was fired] down the grapevine…for not wearing proper PPE" (Tr. V. 735:3-5). Similarly, Matis "heard [that Rossey] was out in the field without FR clothing." (Tr. V. 807:2-3). No one ever even told Garner what happened to Rossey. (Tr. V. 703:21-23).

The only contrary testimony presented by General Counsel is Selby's uncorroborated claim that Allen, in the midst of presenting a well-researched and "sophisticated" presentation, told Selby that he fired Rossey for being a prick. (Tr. IV. 644:10-11). Ignoring that the record contains no basis for the ALJ's crediting of Selby's rendition of the August 17 one-on-one meeting over Allen's denial,[10] Selby's claim alone cannot support a *Gissel* order where the record is devoid of any evidence that Selby told any other putative unit employee about Allen's alleged reason for terminating Rossey's employment. The record is similarly devoid of any evidence that Selby told any other putative unit employee about Allen's alleged threats made on August 17. No evidence exists suggesting Allen's purportedly unlawful statements to Selby on August 17 affected any putative unit employee, Selby included. *See Cardinal Home Products*, 338 NLRB 1004, 1011 (2003) (no *Gissel* order where virtually all unfair labor practices occurred in one-on-one situations, did not affect significant portion of bargaining unit, and were not disseminated). Indeed, Selby continues his fervent support for the Union even today.[11] The record likewise contains no evidence that putative bargaining unit members (other than Franzen, of course) even knew that Franzen's

[10] See discussion supra..
[11] As of this writing Selby remains on strike.

employment was terminated or why. (Tr. V. 736:1-3 (Mathis did not know that Franzen was terminated)).

What remains—alleged 8(a)(1) violations during Allen's August 16 group meeting (allegations that Spike also disproved)—are not the sort of severe, "hallmark" violations needed to support a *Gissel* order.[12] Indeed, the Board has refused to impose a bargaining order where the alleged unfair labor practices were equivalent to or even more severe than those that Spike was alleged to have committed. *See, e.g.*, *Aqua Cool*, 332 NLRB 95, 95-97 (2000) (no bargaining order where employer threatened plant closure, solicited and promised to remedy grievances, threatened job loss, implied voting would be futile, granted employee benefits, and improved terms and conditions of employment); *Desert Toyota*, 346 NLRB 118, 121-122 (2005) (no bargaining order where employer committed the hallmark violation of discharging the leading union supporter and made statements linking the discharge to union activity, maintained overly broad non-solicitation rule, interrogated employees and solicited them to report on union activities, created an impression of surveillance, and interrogated, solicited grievances from, and impliedly promised benefits to a leading union supporter); *Hialeah Hosp.*, 343 NLRB 391, 395 (2004) (no bargaining order against employer that committed a retaliatory discharge and multiple 8(a)(1) violations including surveillance, threats, promises of benefits, and removal of benefits); *Cast-Matic Corp.*, 350 NLRB 1349, 1349-1350 (2007) (no bargaining order where employer required employees to remove union buttons, prohibited employees from bringing union materials into the plant, made statements to employees that selecting a union would be futile, prohibited certain employees from taking

[12] The ALJ correctly determined that Allen did not engage in unlawful surveillance of Holland on August 16 by asking about a Union sticker Holland placed on Spike's truck. (D.21:7-9) Ignoring that the ALJ's harassment finding on Allen's sticker inquiry to Holland violates Spike's due process rights, the record makes clear it was not a "hallmark" violation and it was never widely shared with other putative unit members. As a result, any sticker-related violation cannot support the ALJ's *Gissel* analysis and determination that a *Gissel* Category II order was appropriate.

breaks, interrogated job applicants about union sentiments, and threatened employees with job loss if union was selected); *Jewish Home for the Elderly*, 343 NLRB at 1121 (no bargaining order against employer that discharged a leading union activist one day before the election, granted a unit-wide wage increase, threatened plant closure, and engaged in surveillance); *Desert Aggregates*, 340 NLRB 289, 289 (2003) (no bargaining order against employer that laid off two leading union supporters in a unit of eleven employees and unlawfully solicited and promised to remedy employee grievances); *see also Burlington Times, Inc.*, 328 NLRB 750, 752 (1999); *Uarco, Inc.*, 286 NLRB 55, 59 (1987).

Thus because the ALJ failed to fully analyze all *Gissel* factors and a clear preponderance of *all* the relevant evidence shows no widespread dissemination or impact of Spike's purported 8(a)(3) violations or the purported 8(a)(1) violations involving Selby on August 17, the ALJ's recommended bargaining order remedy must be rejected.

3. The ALJ's *Gissel* analysis erroneously failed to consider traditional remedies.

A fair election is the preferred method of establishing a union's representative status. Yet the ALJ failed to even consider traditional remedies (e.g., a rerun election) before imposing extraordinary remedies unaccountable to the record as a whole that would disenfranchise a majority of the putative bargaining unit who do not want the Union. As a result, the ALJ's *Gissel* analysis and finding that a bargaining order is appropriate was erroneous and must be rejected.

H. OBJECTIONS 15 AND 16 SHOULD BE OVERRULED. [Exception 45 and 46]

The record and common-sense show that Spike did not act unlawfully with respect to Holland and O'Neal's ballots. The ALJ failed to understand that both ballots were never received by the Region. O'Neal testified that he put his ballot in his mailbox, but it was never counted by the Region. (Tr. II. 376:9-19, 377:7-8). Similarly, Holland testified that he took his ballot to the post

office, but the Region never counted it. (Tr. I. 123:6-8, 21). In his decision, the ALJ described Holland's ballot as follows: "15. Holland placed his mail ballot in the U.S. Mail, but it was not received or counted by the NLRB at the November 23 vote count." (D. 18:28-29).

Shockingly and inexplicably, just a few sentences later, the ALJ orders "his ballot be opened and counted." *Id.* at 18:35. The ALJ described O'Neal's ballot the same way (never received by the NLRB) but also ordered it to be opened and counted. *Id.* at 18:38-39, 19:1. It defies common sense that the ALJ forgot in the interim that the ballot was never received, so it cannot be opened. In any event, the Union failed to present a shred of evidence connecting Spike to these alleged ballot issues. Spike is not associated with the United States Postal Service and knows nothing about these events so this purported "misconduct" cannot be attributed to Spike. Because the Union presented no competent evidence supporting these wild allegations, Objections 15 and 16 have no merit and should be dismissed.

V. CONCLUSION

Based on the foregoing, Spike urges the Board to reject the ALJ's findings of 8(a)(1) and 8(a)(3) violations and to reverse the ALJ's Conclusions of Law, Remedy, and Order. Spike further urges the Board to dismiss the Complaint in its entirety, to overrule the Charging Party's Objections, and to certify the results of the November 23, 2021 representation election.

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Respectfully Submitted,

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